these alleged conversations with Mr. Rice to Mrs. Cox. Under these circumstances, to conclude that Mr. Rice exercised a managerial or decisionmaking role in connection with the Licensees' stations, and that Mrs. Cox knew it, ignores the overwhelming record evidence to the contrary.

b) The I.D. Failed To Properly Evaluate The Bias Of The Bureau's Two Rebuttal Witnesses

39. The deference generally accorded to an ALJ's credibility determinations (Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)) cannot, by law, relieve the Commission of its independent duty to "draw its own inferences and reach its own conclusions for implementing the statutory mandate." Lorain Journal Co. v. FCC, 351 F.2d 824, 828 (D.C. Cir. 1965). The ALJ's authority to render initial decisions does not mean that this Commission is relegated to the role of a reviewing court, merely sustaining the fact findings of the ALJ unless clearly erroneous. Faulkner Radio, Inc. v. FCC, 557 F.2d 866, 870 n.23 (D.C. Cir. 1977), quoting, Lorain Journal Co. v. FCC, supra. To the contrary, the Commission always retains the authority to reject the credibility assessments of the judge. Id. Indeed, the Commission has specifically acknowledged that even where findings are based on credibility assessments of the ALJ, the Commission would be "derelict in [its] statutory duty to act in the public interest if [it] were to accept findings which are patently in conflict with what [it] find[s] to be the facts established by the record." Milton Broadcasting Company, 34 FCC 2d 1036, 1045 (1972), citing FCC v. Allentown Broadcasting Corp., 349 U.S. 358 (1955); NLRB v. Jackson Maintenance Corp., 283 F.2d 569 (2d Cir. 1960). Accordingly, in this case, the Commission, itself, must assess the credibility of witnesses.

40. The I.D. (¶¶181-89) improperly concludes that more weight should be given to the testimony of Messrs. Hanks and Rhea than to the testimony of Mrs. Cox and Messrs. Hauschild, Brown, and Leatherman based on its erroneous analysis of witness bias and corroborative documentary evidence, and on faulty demeanor findings. The record is clear, however, that Messrs. Hanks and Rhea were both disgruntled former employees of the Licensees. Indeed,

after Mr. Hanks was fired as Station KFMZ's program director in August 1994, he filed a discrimination lawsuit against CMI, which is still pending. Tr. 362-64. Mr. Hanks also believes that his termination was "unfair" (Tr. 432-34) and admitted that he is self-centered and has "a tendency to exaggerate" (Tr. 389, 471). Also, Mr. Hanks now works for a direct competitor of KFMZ. Tr. 361, 552. Finally, Mr. Hauschild testified that he heard Mr. Hanks state in connection with the discrimination case that he wanted to "get the station, the company, Mike Rice, and everything the law is going to allow me". Tr. 615.

41. As for Mr. Rhea, who was fired as General Manager of Stations WBOW and WZZQ in December 1992, he viewed his termination as a "career setback," and he admitted to having some animosity toward both Mrs. Cox and Mr. Rice at the time of his termination. Tr. 523-24. In this connection, the I.D. concludes (¶188) that while Mr. Rhea felt animosity towards Mrs. Cox when he was fired, "there is no evidence in his testimony that those feelings toward Cox have continued unabated." To the contrary, the Licensees maintain that since Mr. Rhea conceded animosity on the record, the I.D. improperly presumes that the passage of time has caused such bias to dissipate. If anything, this hearing presented for Mr. Rhea his first opportunity to "get even" with Mr. Rice, if he was so inclined. His testimony therefore should be rejected as unreliable.

42. In sharp contrast, contrary to the I.D.'s conclusions, the Licensees' witnesses showed no bias. Indeed, Mrs. Cox's unchallenged testimony established that she did not need her job with the Licensees to live in the style to which she and her husband are accustomed (Tr. 600). And, although the I.D. impermissibly concludes (¶185) that it is "inherently improbable" that Mrs. Cox has other sources of income and could continue her present lifestyle without the Licensees' employment, there is not a scintilla of evidence to corroborate this conclusion. What makes this conclusion especially prejudicial and insupportable is that the Bureau made no inquiry about Mrs. Cox's assets or other sources of income. As to Mr. Leatherman, his employment

by LBI terminated prior to his appearance as a witness (Tr. 133-34), and, therefore, he has no pecuniary interest whatsoever in the outcome of this case. Regarding Mr. Brown, his direct testimony that he has managed CBI's Terre Haute stations since April 1993 without any input from Mr. Rice went unchallenged as the Bureau declined the opportunity to cross-examine him. Moreover, the Bureau never elicited testimony from either of its rebuttal witnesses that refuted Mr. Brown's direct testimony. Thus, there was no basis in the record for discrediting Mr. Brown, as the I.D. did. Finally, regarding Mr. Hauschild, the Bureau also declined to cross examine his written direct case testimony; when he subsequently appeared as a surrebuttal witness, no testimony was elicited that reflected the sort of bias that obviously shaded the testimony of the Bureau's rebuttal witnesses, i.e., an admitted animus toward the Licensees and admitted tendency to exaggerate. In short, there is no basis in the record for discrediting the testimony of Mrs. Cox and Messrs. Leatherman, Brown and Hauschild based on bias, while the record is replete with testimony reflecting bias on the part of Messrs. Rhea and Hanks, and the I.D. clearly erred in its assessment of same.

43. Illustrative of the faulty demeanor findings is the I.D.'s observation (n.8) that Mr. Hanks "became very impassioned and angry, his voice rose in denial, and his face reddened" when he was cross-examined concerning the charge that he wanted to "get Mike Rice" or "get his stations". The I.D. states (id.) that these reactions show that Mr. Hanks was "genuinely and extremely offended," and, based upon this demeanor observation, it concludes that Mr. Hanks' denial was credited. However, the Licensees urge that Mr. Hanks' reactions more accurately reflect the embarrassment and feigned indignation of a liar caught in his lie. And, given his contradicted testimony, his obvious animus as a fired employee in a litigation with his former employer, and his red-faced demeanor, Mr. Hanks' testimony should have been completely discredited as unreliable. NLRB v. Jackson Maintenance Corporation, 283 F.2d at 570 ("record

on review may well create doubts with respect to the truthfulness of a witness so powerful that they outweigh any evaluation based upon demeanor").

44. As to the alleged existence of corroborative evidence supporting the testimony of Messrs. Hanks and Rhea, the I.D. (¶181) relies upon six memoranda between Mr. Rice and Mr. Leatherman (discussed at Paragraph 37, supra), three letters that Mr. Rice wrote in response to offers to purchase one of the Licensees' construction permits, and one post-incarceration letter from Mr. Rice to Mrs. Cox concerning specific matters at the Licensees' stations. The Licensees except to the I.D.'s erroneous conclusion (¶181) that these documents "show that Rice was doing more than consultative work, and that he had not been excluded from having a managerial role in the affairs of the Licensees". They do nothing of the sort. As previously stated, five of the memoranda between Messrs. Rice and Leatherman involved the station's physical plant and reflected Mr. Rice's concerns as a landlord. In response to the sixth memo, Mr. Leatherman dealt exclusively with Mrs. Cox, not Mr. Rice. The I.D. (¶180) incorrectly concludes that these important distinctions are not "decisionally significant"; according to the I.D., what matters is only that Mr. Rice gave "orders" and Mr. Leatherman carried them out. This cannot be, since the question at hand is whether Mrs. Cox or the Licensees knowingly misrepresented to the Commission that Mr. Rice had no managerial or policy role related to station operations (as opposed to building-related matters of interest to Mr. Rice as a landlord).

45. As to Mr. Rice's correspondence responding to inquiries regarding the potential sale of a construction permit, Mr. Rice is the sole shareholder of CBI's parent company (CMI), and the letters in question discuss a possible transaction involving a potential sale of CBI's KAAM-FM permit, a major asset of the company. Mr. Rice's response to such inquiries is not inconsistent with the Licensees' representations that Mr. Rice was severed from the management and operational decisions of the Licensees. As a shareholder, Mr. Rice's rejection of preliminary inquiries about a possible sale of a construction permit does not rise to making day-to-day

policy or management decisions about the Licensees' operations. Finally, as to Mr. Rice's November 13, 1995 letter to Mrs. Cox (Bur. Exh. 9), there is no record evidence contradicting Mrs. Cox's testimony that, as Vice President and CEO, she felt no obligation to heed Mr. Rice's suggestions, and she made all of her managerial decisions based upon her own independent judgment. Tr. 309-314.

c) Other Unsupported Or Improper I.D. Conclusions

46. There is no record support for the I.D.'s erroneous inference that merely because certain events may have happened after Mr. Rice allegedly spoke to Mr. Rhea or Mr. Hanks, they necessarily happened because of those alleged conversations. For instance, the record shows that even if, as Mr. Hanks claims, Mr. Rice told him that Janice Pratt had a squeaky voice and, therefore, should be fired, Ms. Pratt was not fired for several months after Mr. Rice's alleged comments were made and, more importantly, Mr. Hanks himself admitted that he fired her because of performance problems wholly unrelated to her on-air voice. And, it was Mr. Hauschild who directed Mr. Hanks to have Ms. Pratt correct her performance problems or to terminate her -- several months before she was eventually terminated. Tr. 441-42, 605-07.

47. Similarly, regarding the allegations of Mr. Rhea and/or Mr. Hanks that Mr. Rice was involved in the hiring and/or firing of program directors (Hohlman, Steele, Savage and Jacobs) at WZZQ and WBOW, the overwhelming weight of the credible evidence is to the contrary. For example, with respect to Hohlman, both Mrs. Cox and Mr. Rhea testified that he voluntarily left to take a job in a larger market. Tr. 483, 555. Mrs. Cox further said that she hired Steele without Mr. Rice's direction or approval and that she ordered Mr. Rhea to fire him (or allow him to resign), based on her own view of a "Radio & Records" reporting debacle, a memo from Mr. Hanks, and conversations with Mr. Rhea. Tr. 263-66, 406-07, 442-47, 485, 511-12, 555-56, 560, 568-69. And as to Savage, Mrs. Cox and Mr. Rhea testified that Mr. Rhea hired him (Tr. 491, 569) and that she fired him, based on her own evaluation of his

performance and input from Messrs. Rhea and Hanks, and without Mr. Rice directing her to do so or telling her that he wanted Savage fired. Tr. 380, 514, 570-72. Finally, Mrs. Cox testified that WZZQ's General Manager, Kenneth Brown, fired Jacobs as program director based on his own evaluation of Jacobs' performance (he was overwhelmed by the job), that Mr. Rice never told her that Jacobs had to go, and that, to the best of her knowledge, Mr. Rice did not direct Mr. Brown to fire him. Tr. 414-17, 448, 575-76. Corroborating Mrs. Cox was Mr. Brown's uncontested direct testimony that Mr. Rice has not been involved in any personnel matters at the Terre Haute stations during Mr. Brown's tenure. Lic. Exh. 4, pp. 1-3. Thus, the proof is utterly lacking that Mr. Rice's comments dictated personnel decisions. Therefore, it was error for the I.D. to conclude on the basis of the record evidence that the Licensees intentionally failed to disclose that Mr. Rice was making personnel decisions for the stations.

48. Finally, the I.D. (¶175) concludes that neither Mrs. Cox nor Mr. Hauschild had any personal knowledge of Mr. Rice's alleged conversations with, or directives to, Messrs. Hanks and Rhea concerning programming and personnel matters. Under all of these circumstances, it is inconsistent and plainly wrong for the I.D. to conclude (¶¶191, 194) that Mrs. Cox and the Licensees had knowledge of, but failed to disclose, Mr. Rice's involvement in at least some programming and personnel matters and management-level activities. In sum, the Licensees should be exonerated under Issue 2, because the question is not whether Mr. Rice actually gave any directives to Mr. Hanks or Mr. Rhea after April 1991, but rather whether the Licensees intentionally misrepresented Mr. Rice's involvement in their §1.65 reports to the Commission.[10/] They plainly did not.

[10/] The I.D. paradoxically concludes under Issue 1 (¶151) that the Licensees failed to adequately prevent Mr. Rice from participating in the management and operation of their stations and, under Issue 2 (¶195), that Mr. Rice had a "duty to ensure that the Licensees' submissions to the Commission were complete, accurate, and truthful". In so doing, the I.D. erroneously attempts to connect the Rice conviction-related facts and conclusions under Issue 1 with the Licensees' candor-related facts and conclusions under Issue 2. However, it is obvious that the Licensees (continued...)

3. The Licensees Did Not Intentionally Mislead The Commission And Had No Motive To Deceive

49. "Intent to deceive" is a necessary element in proving either misrepresentation or lack of candor in Commission proceedings. See Fox River Broadcasting, Inc., 93 FCC 2d at 129 ¶6. Likewise, "intent to deceive" implies deliberateness. See Reding Broadcasting, Inc., 69 FCC 2d 2201, 2207 (Rev. Bd. 1978). The Licensees except to the I.D.'s conclusions (¶¶162, 190, 192) that they intended to mislead or deceive the Commission concerning Mr. Rice's role at the stations and allegedly had a logical reason or motive to do so.

50. Simply put, there is no record evidence or reasonable inference of any deliberate intent by the Licensees to mislead or deceive the Commission. Rather, the record shows that Mrs. Cox was concerned that the content of the initial June 1991 §1.65 report was no longer accurate after Mr. Rice began to undertake certain limited technical/engineering consultative tasks, and, thus, she undertook to modify the reports accordingly. Lic. Exh. 1, p. 8; Tr. 297-98. Under these circumstances, if the Commission should find that the Licensees committed any reporting inaccuracies, it should also conclude that they were "blunders totally devoid of the requisites of deliberate misrepresentations" or lack of candor. See Reding Broadcasting, Inc., at 2207. In other words, where, as here, a finding of misrepresentation or lack of candor hinges upon knowledge of Mr. Rice's alleged directives to Mr. Hanks or Mr. Rhea and upon whether such alleged statements constituted managerial or policy decisionmaking, the failure to report such alleged "involvement" falls far short of demonstrating an intent to deceive. Clearly, the Licensees attempted, in good faith, to comply with §1.65 of the Rules. If somehow they fell short by not providing as much detail as the I.D. would have liked, this shortcoming was

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[10/](...continued)
cannot be faulted for excluding Mr. Rice from reviewing and signing Commission filings, such as §1.65 reports, when they intentionally excluded him from such management-level activities.

unintentional and not disqualifying. Therefore, Issue 2 should be decided in the Licensees' favor.

51. Finally, the Licensees maintain that the I.D. (¶192) engages in pure speculation in concluding that they had a motive to mislead or deceive the Commission in their reports to try to forestall a Commission inquiry or investigation into the criminal allegations pending against Mr. Rice. Contrary to the ALJ's surmise, the Licensees embarked upon a regime of filing §1.65 reports -- consistent with then-existent Commission policy. There is no evidence that the Licensees ever believed that the specific language used in the §1.65 reports would have forestalled the initiation of any Commission inquiry or investigation, as the ALJ conjectures.[11/] The Licensees were merely trying to comply with unwritten Commission reporting standards for pending criminal proceedings. Therefore, the I.D. errs in finding any motive to mislead or deceive in the contents of the Licensees' §1.65 reports.

D. Revocation Of The Licensees' Five Licenses And Two Construction Permits Violates The Excessive Fines Clause Of The Eighth Amendment

52. Initially, it must be recognized that the I.D.'s conclusion that all five licenses and two construction permits should be revoked is advisory only. See Central Nat. Bank v. U.S. Dept. of Treasury, 912 F.2d 897, 904-05 (7th Cir. 1990) ("The relevant discretion...is that of the Comptroller not of the administrative law judges whom he employs to preside at hearings and make findings and conclusions that, so far as the appropriate remedy is concerned, are merely recommendations."), citing, inter alia, Lorain Journal Co. v. FCC, supra. It is solely up to the Commission to determine the appropriate remedy herein after its full review of the record below. The Licensees submit that the I.D.'s recommended remedy of revoking all of the Licensees' five licenses and two construction permits would violate the Excessive Fines Clause

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[11/]In fact, the Licensees fully expected the Commission to launch an inquiry or investigation shortly after Mr. Rice was convicted, and, therefore, they filed a "Brief in Opposition to Commencement of Revocation or Evidentiary Hearing" on December 20, 1994.

of the Eighth Amendment to the U.S. Constitution, which provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". The penalty of license revocation because of Mr. Rice's felony convictions is excessive and constitutes an unconstitutional sanction under recent Supreme Court case law.

53. In Austin v. United States, 509 U.S. 602 (1993), the Supreme Court held that the Excessive Fines Clause applies to the civil forfeiture of property used to facilitate the commission of a Federal drug offense under 21 U.S.C. §881(a)(4) and (a)(7). Specifically, the Court ruled that a civil forfeiture constituting payment to the government is a punishment because it does not serve a solely remedial purpose within the meaning of the Eighth Amendment. The Court recognized that the purpose of the Eighth Amendment is to prevent the government from abusing its power to punish. Id. at 604-07. In so concluding, the Court stated (id. at 610):

> [W]e are mindful of the fact that sanctions frequently serve more than one purpose. We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause.

54. While the Commission can commence revocation proceedings against licensees under §312 of the Act, this authority has consistently been held by the Commission and the courts as an appropriate civil "penalty," punishing various misconduct. See, e.g., CBS, Inc. v. FCC, 453 U.S. 367, 378 (1981) (license revocation is "penalty" under §312(a)(7) of the Act); Renewal/ Revocation Approach, 93 FCC 2d 423, 432 (1983) (same); Broadcast Hoaxes, 7 FCC Rcd 4106, 4107 (1992) (admonition and license revocation or non-renewal are "penalties" for perpetration of broadcast hoaxes); Theodore E. Sousa, 92 FCC 2d 173, 179 (1982) (revocation is appropriate "penalty" under §312(a)(2) of the Act).

55. Under these circumstances, given the punitive nature of revocation, it is clear that the Commission's actions herein must be scrutinized under the Excessive Fines Clause, and the Commission must apply the Austin holding to determine the constitutional propriety of license

revocation here. Cf. United States v. Reveille, 21 F.3d 1118, 1994 WL 118068 (9th Cir. 1994)(unpublished opinion)(forfeiture of radio broadcast equipment may be "punishment" subject to scrutiny under Excessive Fines Clause). Revocation of any of the Licensees' licenses or permits under Issue 1 plainly would be wholly punitive, given the Licensees' demonstrated lack of involvement with Mr. Rice's felonious misconduct and their record of exemplary Commission compliance. And, considering that a Missouri court already has punished Mr. Rice by imposing on him a prison term of eight years[12/], revocation of the Licensees' licenses and construction permits would be clearly excessive under the Eighth Amendment and, thus, unconstitutional. So too, under Issue 2, where the weight of the evidence cannot support a conclusion that the Licensees acted with an intention to deceive the Commission, revocation of the Licensees' licenses and permits would be unduly punitive.

56. In discussing sanctions for misconduct in CPS-1, 102 FCC 2d at 1228 ¶103, the Commission stated that "a range of sanctions short of revocation or failure to renew a license can be imposed...[and] [s]uffering the loss of one station, with the costs thereby imposed, will likely serve to deter all but the most unrepentant from serious future misconduct" (emphasis added). Indeed, in United Broadcasting Co., 100 FCC 2d 1574, 1585 (1985)(emphasis added), the Commission held that after two commonly-owned stations had lost their licenses because of station-related misconduct, a third station was entitled to a renewal because "sanctions for broadcast misconduct should be reasonably tailored to deter misconduct by the involved broadcaster and others. Applying the reasoning of CPS-1, supra, and the United case, the Licensees urge that, assuming arguendo, the Commission concludes that any licenses should be revoked in this proceeding, revoking all five licenses and two permits would represent an improper and excessive exercise of the Commission's discretion contrary to public interest.

[12/] In this connection, official notice is requested of the fact that Missouri law requires Mr. Rice to reimburse the State for the cost of his incarceration, and he has already paid $20,000.

57. Finally, the Licensees ask that official notice be taken of the 1997 Annual Employment Reports (FCC Form 395-B) for their stations. Stations WBOW/WZZQ/WZZQ-FM have 11 full-time ("FT") and 13 part-time ("PT") paid employees; KFMZ(FM), 14 FT and 5 PT; and KBMX(FM), 10 FT and 4 PT, for a grand total of 35 full-time and 22 part-time paid employees. In other words, the revocation of the Licensees' five licenses will directly adversely affect the lives of 57 employees, apart from Mr. Rice. This is the sobering, real-world impact of the I.D.'s proposal to revoke all five of the Licensees' licenses, apart from the multi-million dollar forfeiture when the fair market value of the five stations is considered.

III. CONCLUSION

58. The ultimate question herein is whether the evidentiary record considered as a whole, when weighed against Commission policy, case precedent, constitutional law principles, and the paramount public interest, requires the revocation of the Licensees' five licenses and two construction permits. Neither the record evidence nor the law supports an adverse conclusion under any of the designated issues. Consequently, revocation of any of the Licensees' licenses or permits is unwarranted and, at most, a monetary forfeiture could be levied under Issue 2.

WHEREFORE, in light of the foregoing, the Licensees respectfully urge that this proceeding should be terminated without the revocation of any licenses or construction permits.

Respectfully submitted,

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October 31, 1997

CERTIFICATE OF SERVICE

I, Gillian Kirkpatrick, a secretary in the law offices of Rosenman & Colin LLP, do hereby certify that on this 31st day of October, 1997, I have caused to be hand-delivered a copy of the foregoing "Licensees' Exceptions and Brief" to the following:

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